

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA.,

Plaintiff,

v.

DALE DUPREE CASEY,

Defendant.

Case No. 2:20-CR-0020-RAJ

**ORDER GRANTING MOTION  
TO DISMISS**

This matter is before the Court on Defendant's motion to dismiss Count 2 of the indictment. Dkt. # 18. For the following reasons, Defendant's motion is **GRANTED**.

**I. BACKGROUND**

Defendant is charged with two counts: (1) Assault by Strangulation in violation of 18 U.S.C. §§ 113(a)(8) and 1153; and (2) Domestic Assault – Habitual Offender in violation of 18 U.S.C. § 117(a). Dkt. # 12. To secure a conviction under 18 U.S.C. § 117(a), the Government must prove three elements beyond a reasonable doubt: (1)

1 Defendant committed a domestic assault (as alleged in Count 1), (2) the assault occurred  
 2 in Indian country, and (3) Defendant “has a final conviction on at least 2 separate prior  
 3 occasions in Federal, State, or Indian tribal court proceedings for offenses that would be,  
 4 if subject to Federal Jurisdiction . . . any assault, sexual abuse, or serious violent felony  
 5 against a spouse or intimate partner . . . .” 18 U.S.C. § 117(a).

6 Here, the Government pled two convictions that it contends satisfy the statute’s  
 7 requirements: (1) a 2002 conviction for Assault – Class C, under Swinomish Tribal  
 8 Code, § 5-1.030, and (2) a 2014 conviction for Assault – Class B, Domestic Violence,  
 9 under Swinomish Tribal Code, § 4-02.020(C). Defendant moves to dismiss Count 2 of  
 10 the indictment under Federal Rule of Criminal Procedure 12, claiming that the  
 11 indictment fails to state an offense. *See* Fed. Rule Crim. Proc. 12(3)(B). Specifically,  
 12 Defendant argues that the two prior convictions alleged in Count 2 are “categorically  
 13 overbroad” and do not qualify as predicate defenses under 18 U.S.C. § 117(a).

## 14 II. DISCUSSION

15 Rule 12(b) permits consideration of any defense “which is capable of  
 16 determination without the trial of the general issue.” Fed. R. Crim. P. 12(b). A motion  
 17 to dismiss is generally “capable of determination” before trial “if it involves questions of  
 18 law rather than fact.” *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452  
 19 (9th Cir. 1986), *cert. denied*, 478 U.S. 1007 (1986). Although a court may make  
 20 preliminary findings of fact necessary to decide the legal questions presented by the  
 21 motion, it may not “invade the province of the ultimate finder of fact.” *Id.* Generally,  
 22 Rule 12(b) motions are appropriate to consider “such matters as former jeopardy, former  
 23 conviction, former acquittal, statute of limitations, immunity, [and] lack of jurisdiction.”  
 24 *United States v. Smith*, 866 F.2d 1092, 1096 n.3 (9th Cir. 1989).

25 The parties dispute the approach that the Court should apply to determine if  
 26 Defendant’s prior convictions qualify as predicate offenses under § 117(a). Defendant  
 argues that the Court should adopt the “categorical approach” because the statute refers

1 to generic crimes regarding Defendant’s prior convictions, rather than particular facts or  
 2 conduct. But the Government argues that the Court should employ a circumstance-  
 3 specific approach because Defendant’s prior convictions are elements of the substantive  
 4 offense that should be proven at trial.

#### 5 **A. Applicability of Categorical Approach**

6 The categorical approach asks a court to review the elements of the offense rather  
 7 than the underlying facts of the defendant’s conduct. *Taylor v. United States*, 495 U.S.  
 8 575, 601 (1990). This approach is typically applied in sentencing proceedings to impose  
 9 enhanced penalties based on a defendant’s prior convictions. For example, in *Taylor*, the  
 10 Supreme Court applied the categorical approach to determine whether a defendant’s  
 11 prior state court burglary conviction constituted a qualifying offense under the Armed  
 12 Career Criminal Act (“ACCA”), 18 U.S.C. § 924. *Taylor*, 295 U.S. at 601.

13 The benefits of this approach are two-fold. First, the categorical approach avoids  
 14 the “practical difficulties and potential unfairness” of relitigating prior convictions.  
 15 *Taylor* at 601. Second, this approach mitigates Sixth Amendment concerns by limiting a  
 16 sentencing court’s inquiry to the elements of a defendant’s prior offenses, not the  
 17 particular facts underlying those convictions. *See Apprendi v. New Jersey*, 530 U.S. 466,  
 18 490 (2000) (holding that only a jury, not a judge, may find facts that increase the  
 19 maximum penalty).

20 The Government advocates the use of a circumstance-specific approach that  
 21 allows the Court to consider the specific circumstances surrounding the Defendant’s  
 22 conduct. This approach applies where the underlying statute refers to specific  
 23 circumstances, rather than generic crimes. For example, in *Nijhawan v. Holder*, the  
 24 Supreme Court considered the Immigration and Nationality Act which defines an  
 25 “aggravated felony” in part as “an offense” (1) that “involves fraud or deceit,” and  
 26 (2) “in which the loss to the victim or victims exceeds \$10,000.” 557 U.S. 29, 33  
 (2009); 8 U.S.C. § 1101(a)(43)(M)(i). There, the Supreme Court held that the monetary

1 threshold requirement should not be applied categorically, but rather to specific  
2 circumstances surrounding an offender's commission of a fraud and deceit crime on a  
3 specific occasion. *Nijhawan*, 557 U.S. at 40 (2009). The statutory language, it reasoned,  
4 focuses on the individual's conduct rather than the generic crime. *Id.* To hold otherwise  
5 would render the statute nearly meaningless as there are few widely applicable state or  
6 federal fraud statute with the relevant monetary loss threshold. *Id.* at 39-40.

7 A statute may also present a "hybrid situation" in which one section of the statute  
8 is governed by the categorical approach while another is subject to the circumstance-  
9 specific approach. For example, in *United States v. Hayes*, the Supreme Court  
10 considered 18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by any person  
11 convicted of "a misdemeanor crime of domestic violence." *United States v. Hayes*, 555  
12 U.S. 415 (2009). The statute defines "misdemeanor crime of domestic violence" as "an  
13 offense" that (1) "has, as an element, the use or attempted use of physical force," and  
14 (2) was "committed by" a person who has a domestic relationship with the victim. 18  
15 U.S.C. § 921(a)(33)(A). The Supreme Court concluded that the phrase "an offense  
16 that . . . has, as an element, the use or attempted use of physical force" was subject to the  
17 categorical approach, while the phrase "committed by" a person who has a domestic  
18 relationship with the victim, focused on a defendant's conduct and was subject to the  
19 circumstance-specific approach. *Hayes*, 555 U.S. at 421-22; *see also* *United States*  
20 *v. Doss*, 630 F.3d 1181, 1197 (9th Cir. 2011) (analyzing 18 U.S.C. § 3559(e)(1) and  
21 concluding that the phrase "a prior 'sex offense' conviction" required application of a  
22 categorical approach and the phrase "in which a minor was the victim" called for  
23 application of a circumstance-specific approach and had to be proven beyond a  
24 reasonable doubt by the Government at trial).

25 Section 117(a) clearly implicates the hybrid approach employed in *Hayes* and  
26 *Doss*. Here, the statutory provision can be broken into two parts. The first element  
requires "a final conviction on at least two separate occasions in Federal, State, or Indian

1 tribal court proceedings for offenses that would be, if subject to Federal  
2 jurisdiction . . . any assault, sexual abuse, or serious violent felony . . .” 18 U.S.C.  
3 § 117(a). The first element’s use of the term “conviction” favors the categorical  
4 approach. The Supreme Court has suggested as much. *See Mathis v. United States*, 136  
5 S. Ct. 2243, 2252–53 (2016); *see also Taylor*, 495 U.S. at 600 (holding the language “a  
6 person who . . . has three previous convictions” points to categorical approach).  
7 Additionally, the first element does not use the terms “commit” or “involve,” which the  
8 Court has recognized may implicate the circumstance-specific approach. *See Taylor*,  
9 495 U.S. at 600 (noting the absence of the word “involve” favored the categorical  
10 approach); *Hayes*, 555 U.S. at 421-422 (interpreting the phrase “offense . . . committed  
11 by” to refer to a defendant’s underlying conduct).<sup>1</sup>

12 By contrast, the second element requires that the predicate offenses were “against  
13 a spouse or intimate partner, or against a child of or in the care of the person committing  
14 the domestic assault.” Much like *Nijhawan*, the phrase “against a spouse or intimate  
15 partner” refers to the underlying conduct involved in the commission of the offense of  
16 conviction rather than the elements of the offense. *Nijhawan*, 557 U.S. at 39. Thus, the  
17 use of the circumstance-specific approach is appropriate. *See Doss*, 630 F.3d at 1196-  
18 97. Practical considerations support this interpretation. Section 117 was enacted to  
19 address the disproportionately high rates of domestic violence against Native American  
20 women by allowing federal prosecutors to pursue cases against serial domestic violence

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23 <sup>1</sup> The Government argues that the phrase “if subject to Federal jurisdiction” is rendered  
24 toothless under the categorical approach—the Court disagrees. If anything, this  
25 provision explicitly directs courts to compare a defendant’s prior statutes of conviction  
26 with the federal generic offenses to determine if they are a categorical match. *See U.S. v.*  
*Cline*, No. CR19-0023-JCC, 2020 WL 1862595, at \*2 n.2 (W.D. Wash. Apr. 14, 2020)  
(holding the phrase “modifies the term ‘offenses that would be’ and thus directs courts to  
compare defendant’s prior statutes of conviction with the federal generic offenses  
subsequently enumerated in § 117(a)(1)”).

1 offenders. *United States v. Bryant*, 136 S. Ct. 1954, 1958–61 (2016). Given this,  
 2 Congress could not have intended the domestic relationship provision to be applied  
 3 categorically but rather to the specific circumstances surrounding the defendant’s  
 4 commission of an “assault, sexual abuse, or serious violent felony” on a specific  
 5 occasion. *Nijhawan*, 557 U.S. at 40 (2009).

6 To summarize, the burden of proving the predicate offense element under  
 7 § 117(a) calls for a two-part inquiry. First, the Court must apply the categorical  
 8 approach to determine if Defendant’s two prior convictions are categorical matches to  
 9 “any assault, sexual abuse, or serious violent felony” as defined by federal law. Second,  
 10 the Government must prove beyond a reasonable doubt that the victim of each predicate  
 11 offense was “a spouse or intimate partner, or against a child of or in the care of the  
 12 person committing the domestic assault.”

### 13 **B. Application of the Categorical Approach**

14 To apply the categorical approach, the Court must compare the elements of  
 15 assault under Swinomish Tribal Code § 4-02.020 with the federal generic definition of  
 16 assault. If the elements of assault under section 4-02.020 are broader than generic  
 17 assault, a conviction under section 4-02.020 will not qualify as a predicate offense under  
 18 § 117(a).

#### 19 **i. Defendant’s prior convictions**

20 The Government alleges that two of Defendant’s prior convictions in  
 21 Swinomish Tribal Court qualify as predicate offenses under § 117(a): (1) a 2014  
 22 conviction for Assault – Class B, Domestic Violence, under Swinomish Tribal  
 23 Code, § 4-02.020(C), and (2) a 2002 conviction for Assault – Class C, under  
 24 Swinomish Tribal Code, § 5-1.030. Dkt. # 12.

1 *1. 2002 conviction*

2 On January 14, 2002, Defendant was charged with one count of Assault – Class  
3 C, under Swinomish Tribal Code, § 5-1.030. At the time, the statute provided as  
4 follows:

5 Any person who: (A attempts with unlawful force to inflict bodily injury  
6 upon another, OR (B) without consent touches, strikes, cuts, shoots, or  
7 poisons the person or body of another, OR (C) intentionally, with unlawful  
8 force, creates in another a reasonable apprehension and fear of bodily  
9 injury even though the infliction of bodily injury was not actually intended,  
10 OR (D) by threatening violence causes another to harm himself, commits  
11 the crime of assault.

12 Swinomish Tribal Code § 5-01.030. The criminal complaint filed against Defendant  
13 alleged that on December 24, 2001, Defendant “without consent and with unlawful  
14 force, did intentionally touch and/or strike the person of [the victim] by pushing her;  
15 and/or intentionally created in [the victim] a reasonable apprehension of fearing physical  
16 injury from defendant.” Dkt. # 20-1 at 2. Defendant accepted a “no contest” plea and on  
17 August 26, 2002, judgment was entered against him. Dkt. 20-1 at 4. Specifically, the  
18 court found Defendant guilty of “Assault (Class C)” in violation of § 5-01.030.

19 *2. 2014 conviction*

20 On March 6, 2014, Defendant was charged with, Assault – Class B, Domestic  
21 Violence, under Swinomish Tribal Code, § 4-02.020. Dkt. # 20-2. The current version  
22 of the Swinomish assault statute mirrors the language of the previous version. *See*  
23 Swinomish Tribal Code § 4-02.020. The criminal complaint alleges that on February 16,  
24 2014, Defendant “did attempt with unlawful force to inflict bodily injury upon another -  
25 to wit, [the victim] – and used a weapon or other instrument or thing likely to produce  
26 bodily harm. At the time of the incident [the victim] was a family or household member  
of the Defendant.” Defendant subsequently pleaded guilty to the assault and on July 23,  
2014, judgment was entered against him. Dkt. # 20-2 at 6-13.

1                   ii. Standard Categorical Approach

2           Compared to the federal generic definition of assault, the Swinomish assault  
3 statute is categorically overbroad. The parties agree that the federal common law  
4 definition of assault is the “generic” offense. Under federal law, assault is “committed  
5 by either a willful attempt to inflict injury upon the person of another, or by a threat to  
6 inflict injury upon the person of another which, when coupled with an apparent present  
7 ability, causes a reasonable apprehension of immediate bodily harm.” *United States v.*  
8 *Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976).

9           The Court will address each element of § 4-02.020 individually.<sup>2</sup> A person  
10 commits assault under § 4-02.020(A)(1) if they “attempt[] with unlawful force to inflict  
11 bodily injury upon another.” Although this closely mirrors the first element of generic  
12 assault, “a willful attempt to inflict injury upon the person of another,” there is one  
13 critical distinction. *United States v. Lewellyn*, 481 F.3d 695, 697 (9th Cir. 2007)  
14 (internal citation omitted). The Swinomish definition does not include the “willful”  
15 *mens rea* requirement.

16           The next provision is even broader. Under § 4-02.020(A)(2), an individual may  
17 commit assault if they “without consent touch[] . . . the person or body of another.” This  
18 clearly criminalizes more conduct than the federal assault statute. The same goes for the  
19 fourth provision which provides that a person commits assault who “by threatening  
20 violence causes another to harm himself.” § 4-02.020(A)(4). Causing another person to  
21 harm themselves it not even contemplated by the generic statute.

22           The third provision, however, is a closer call. A person commits assault under  
23 § 4-02.020(A)(3) if the individual “intentionally, with unlawful force, creates in another  
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25 <sup>2</sup>The fact that one of Defendant’s prior convictions was for a Class B assault and the  
26 other was for a Class C assault is not relevant to the Court’s categorical analysis, as the  
underlying crime in both instances was assault and the underlying elements to sustain an  
assault conviction for both counts are the same.



1 a reasonable apprehension and fear of bodily injury even though the infliction of bodily  
 2 injury was not actually intended.” Although this provision incorporates an “intent”  
 3 requirement, it does not include the “immediacy” requirement present in the federal  
 4 definition. In theory, Defendant surmises, a person could be convicted under § 4-  
 5 02.020(A)(3) if the person creates a “reasonable apprehension of fear of bodily injury” in  
 6 another at time in the distant future. Because the Swinomish assault statute criminalizes  
 7 a broader swath of conduct than the federal generic statute, it is “categorically  
 8 overbroad” under the standard categorical approach.

9           iii. Modified categorical approach

10           In certain cases, even if a statute is not a categorical match under the standard  
 11 categorical approach, it may still qualify under the modified categorical approach. The  
 12 modified categorical approach allows a court to look beyond the statutory text to a  
 13 limited set of documents to determine what crime, with what elements, a defendant was  
 14 convicted of. *Mathis*, 136 S. Ct. at 2249. If the conviction is based on a plea agreement,  
 15 the court’s review is limited to the “terms of the charging document, the terms of a plea  
 16 agreement or transcript of colloquy between judge and defendant in which the factual  
 17 basis for the plea was confirmed by the defendant, or to some comparable judicial record  
 18 of this information.” *Shepard v. United States*, 544 U.S. 13, 26 (2005).

19           Importantly, the modified categorical approach only applies when some of the  
 20 elements of the prior statute of conviction match the federal generic crime while other  
 21 alternative elements do not. *Rendon v. Holder*, 764 F.3d 1077, 1083 (9th Cir. 2014).  
 22 That is not the case here. Instead, each of the alternative elements of the Swinomish  
 23 assault statute are overbroad in their own right. So the modified categorical approach  
 24 does not apply.

25           Even if the Court were to apply the modified categorical approach, the same  
 26 issues that arose under the standard categorical approach would remain. As discussed  
 above, in 2002, Defendant accepted a “no contest” plea and was convicted of Assault –

1 Class C in violation of § 5-01.030. Dkt. # 20-1 at 2. A review of the judgment and  
2 criminal complaint shows that the Government alleged, and the Court concluded, that  
3 Defendant “without consent and with unlawful force, did intentionally touch and/or  
4 strike the person of [the victim] by pushing her; and/or intentionally created in [the  
5 victim] a reasonable apprehension of fearing physical injury from defendant.” Dkt.  
6 # 23-4 at 2. But nothing in the underlying documents shows that to obtain a conviction  
7 under § 5-01.030(C), the Government needed to prove beyond a reasonable doubt that  
8 Defendant created a “reasonable apprehension of *immediate* bodily harm.” Thus, the  
9 prior statute of conviction is not a categorical match to the federal generic offense.

10 Similarly, the criminal complaint in Defendant’s 2014 case alleges that Defendant  
11 “did attempt with unlawful force to inflict bodily injury upon another – to wit, [the  
12 victim] – and used a weapon or other instrument or thing likely to produce bodily harm.”  
13 Dkt. # 20-2 at 1. But the analogous federal generic definition requires a “*willful* attempt  
14 to inflict injury,” and nothing in the underlying documents suggests that a jury must have  
15 concluded that Defendant “willfully” attempted to inflict bodily injury.

16 The Court is mindful of the inherent difficulties of enforcing violations of 18  
17 U.S.C. § 117(a) where the prior statutes of conviction must categorically match the  
18 generic statute. This is especially troubling given the statute’s legislative purpose of  
19 reducing the incidence of domestic violence against Native American women. But the  
20 relevant statutory language and Supreme Court precedent compel this outcome. Because  
21 the two prior convictions alleged by the Government are not categorical matches to the  
22 federal generic assault statute, they do not qualify as predicate offenses under 18 U.S.C.  
23 § 117. As a result, the indictment against Defendant does not state a cognizable offense  
24 and is subject to dismissal.  
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**III. CONCLUSION**

For the foregoing reasons, the Defendant's motion to dismiss Count 2 of the indictment is **GRANTED**. Dkt. # 18. Defendant's motion to sever and second motion to dismiss are **TERMINATED AS MOOT**. Dkt. ## 20, 27.

DATED this 22nd day of April, 2020.

A handwritten signature in black ink, reading "Richard A. Jones", written over a horizontal line.

The Honorable Richard A. Jones  
United States District Judge